IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 361 of 2002
With
CRIMINAL APPEAL No. 362 of 2002

For Approval and Signature:

HONOURABLE MR.JUSTICE A.M.KAPADIA
HONOURABLE MR.JUSTICE K.A.PUJ

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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ABDULHAMID GULAM AHEMAD SHAIKH - Appellant(s)
Versus
STATE OF GUJARAT - Respondent(s)

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Appearance :
Criminal Appeal No. 361 of 2002

Mr. Shakeel Kureshi for appellant

Mr. RC Kodekar, APP for respondent – State of Gujarat

Criminal Appeal No. 362 of 2002

Ms. Banna Dutta, appointed by Legal Aid Committee for appellant

Mr. RC Kodekar, APP for respondent – State of Gujarat

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CORAM : HONOURABLE MR.JUSTICE A.M.KAPADIA

and

HONOURABLE MR.JUSTICE K.A.PUJ

Date : 11/09/2006

COMMON ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE A.M.KAPADIA)

1. The appellants of both these appeals ('A-1' and 'A-2' for short) were charged and tried by the learned Additional Sessions Judge, Fast Track Court, Baroda in NDPS Case No.3 of 2000 for commission of the offences punishable under Section 21 read with Section 8 (c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 ('NDPS Act' for short) arraigned on charge of having been found with contraband article 'charas' when they were apprehended by Haribhai Ganpatrav Galfade, PSI, Vadodara Railway Station, P.W.2, while he was patrolling at platform No.4-5 of Vadodara Railway Station on 14.1.2000 at 9.15 P.M. At the end of the trial, both A-1 and A-2 have been held guilty of the offences with which they were charged as their complicity is proved. Therefore, the learned trial Judge convicted them vide judgment and order dated 27.2.2002 and sentenced them to suffer R.I. for 10 years and fine of Rs.1,00,000/-, i.d. R.I. for a further period of one year.

2. Aggrieved by the order of conviction and sentence, A-1 has filed Criminal Appeal No.361 of 2002 and A-2 has filed Criminal Appeal No.362 of 2002 under Section 374 of the Code of Criminal Procedure ('the Code' for short), from jail.

3. Briefly stated, the prosecution case is that:

3.1. On 14.1.2000 at about 9.15 P.M., when Haribhai Ganpatrav Galfade, P.S.I., Vadodara Railway Police Station, P.W.2 and his staff were performing patrolling at platform No.4-5 of Baroda Railway Station, they found A-1 and A-2 in suspicious condition and hence they were brought to the Railway Police Station for further interrogation and their luggages were searched in the presence of Panch witnesses whereupon they found one plastic bag in a large bag containing maize atta and in the plastic bag they found four balls of charas total weighing about 4.390 Kg. Both the accused persons were found with railway reservation tickets from Jammu to Vadodara. As per the prosecution case, in order to measure the

weight of the contraband article charas, one Mansing Dilipsing was called upon in the police station and three samples weighing 20 grams each from the four balls of charas were seized in the presence of panch witnesses. The accused were asked as to whether they should be searched in presence of First Class Magistrate or Gazetted Officer to which they said 'no'. The said fact was also noted on a separate piece of paper and beneath the same, their signatures were obtained. A complaint against both the accused was lodged at Baroda Railway Police Station with the muddamal, by P.W.2, PSI Haribhai Ganpatrav Galfade.

3.2. Pursuant to the filing of the complaint, investigation was put into motion. During the course of investigation, muddamal was entrusted to Writer Head Constable - Gajendrasinh Sisodia which was kept in the safe cupboard and thereafter it was sent to Forensic Science Laboratory ('FSL' for short) for chemical analysis, on 17.1.2000 with the yadi of PSI through Head Constable Kalidas Ambalal Valand who delivered the same to FSL, Surat in sealed condition. In the FSL chemical analysis was done and

FSL found in its analysis that the muddamal was contraband article charas. During the course of investigation, it was also revealed that the contraband article charas was to be delivered to original accused Nos.3 and 4 and, therefore, they were also arrested. At the end of the investigation, since sufficient incriminating evidence was found against A-1 and A-2 as well as other two accused persons i.e., original accused Nos.3 and 4, who are not before this Court as they have been acquitted, the investigating officer has filed charge-sheet against them for commission of the offences under Section 21 read with Section 8 (c) of the NDPS Act in the Sessions Court, Vadodara.

3.3. The learned Additional Sessions Judge, Fast track Court, Vadodara, to whom the case was made over for trial, framed charge against all the four accused at Ex.5 for commission of the offences punishable under Section 21 read with Section 8 (c) of the NDPS Act which was read over and explained to them. As the accused persons pleaded not guilty to the charge and claimed to be tried, they were put to trial in NDPS Case No.3 of 2000.

3.4. In order to bring home the charge levelled against the accused, the prosecution has examined in all 11 witnesses and relied upon their oral testimonies, details of which have been given in paragraph 4 of the impugned judgment and order as under:

PW No	Ex. No.	Name	status	Page No.
1	Ex.29	Rameshlal Keshavlal Rathod	Panch witness of search and seizure panchnama	48
2	Ex.54	Haribhai Ganpatrav Galfade	PSI – Complainant	68
3	Ex.65	Mansinh Deepsinh Mahida	Independent witness	98
4	Ex.66	Bhailalbhai Vitthalbhai Jadav	Police Witness	102
5	Ex.69	Mohd. Afzal Hajimiya	Independent witness	112
6	Ex.70	Mumtazbanu Hussainmiya	Independent witness	114
7	Ex.71	Shankerbhai Dhanjibhai Marvadi	Panch witness of search and seizure panchnama	116
8	Ex.73	Ashabhai Chhaganbhai Barot	Police witness	122
9	Ex.75	Gajendrasinh Indrasinh Sisodia	Police witness	126
10	Ex.78	Kalidas Ambalal Valand	Police witness	130

PW No	Ex. No.	Name	status	Page No.
11	Ex.81	Juvansinh Gulabsinh Rathod	Police Inspector, Investigating Officer	133

3.5. To prove the culpability of the accused, the prosecution has produced a number of documents and relied upon the contents of the same, details of which are enumerated in paragraph 5 of the impugned judgment and order.

3.6. After recording of the evidence of the prosecution witnesses was over, the learned trial Judge explained to the accused the circumstances appearing against them in the evidence of the prosecution witnesses and recorded their further statement as required under Section 313 of the Code. In their further statement, the accused denied the case of the prosecution by saying that they have been falsely implicated in the case. However, they did not lead any evidence nor did they examine any witness in support of their defence.

3.7. On appreciation, evaluation, analysis and close scrutiny of the evidence adduced by the prosecution, the learned trial Judge held that the complicity of A-1 and A-2 has been established as they were found with contraband article charas on platform No.4-5 of Baroda Railway Station and during the search from them in the presence of panchas the said contraband article was recovered which was measured in presence of the panchas and after following necessary formalities envisaged under the NDPS Act, samples were sent to the FSL for analysis and the report of FSL in terms certified that the muddamal article sent for analysis was charas which is prohibited under section 8 (c) of the NDPS Act and commission of such offence is punishable under Section 21 of the NDPS Act whereas complicity of remaining two accused who are not before this Court was not established. He, therefore, vide judgment and order dated 27.2.2002 convicted A-1 and A-2 for commission of offenecs punishable under Section 21 read with section 8 (c) of the NDPS Act and sentenced them to suffer RI for 10 years and fine of Rs.1,00,000/- i.d. R.I. for further period of one year which has given rise to both these Criminal Appeals at the

instance of A-1 and A-2 under Section 374 of the Code which they have sent from jail.

4. A-1 has filed Criminal Appeal No.361 of 2002 from jail. However, subsequently Mr. Shakeel Kureshi, learned advocate has filed appearance and made submissions on his behalf. According to Mr. Kureshi, learned advocate of A-1, as per panchnama Ex.30, the second bag from which the contraband article charas was found was with A-2 and not with A-1. From the first bag which was with A-1 what was found was cloths. Therefore A-1 was not carrying the bag containing contraband article charas. It is a cardinal principle of criminal jurisprudence that if contraband article was not found from the person he cannot be convicted. However, the learned trial Judge held that it was joint possession of both A-1 and A-2 which is not permissible under the law. He, therefore, urged that the impugned judgment and order convicting A-1 and sentencing him to suffer R.I. for 10 years and fine of Rs.1,00,000/- i.d., R.I. for a further period of one year, is against settled canons of criminal jurisprudence and hence conviction recorded and sentence imposed on A-1,

appellant of Criminal Appeal No.361 of 2002, deserves to be quashed and set aside by allowing this appeal. He, therefore, urged to allow Criminal Appeal No. 361 of 2002 and resultantly A-1 may be acquitted of the offences with which he was charged.

In support of the aforesaid proposition of law, Mr. Kureshi, learned advocate of A-1, has relied upon the following judgments of the Supreme Court:

(i) State of Punjab v. Balkar Singh and another, (2004) 3 SCC 582, and

(ii) Sorabkhan Gandhkhan Pathan and another v. State of Gujarat, (2004) 13 SCC 608.

5. Ms. Banna Dutta, learned advocate appointed by Legal Aid Committee on behalf of A-2, who is appellant in Criminal Appeal No.362 of 2002, contended that even though two independent witnesses, P.W.5, Mohd. Afzal Hajimiya Ex.69 and P.W.6, Mumtazbanu Hussainmiya, Ex.70 have not supported the prosecution case and turned hostile, the panch witnesses have also not

supported the prosecution case and also turned hostile and the recovery of contraband article charas from A-2 is not established beyond reasonable doubt, the learned trial Judge has convicted A-2 merely relying upon the evidence of Police Witnesses, which is not permissible under the law. Therefore, according to her, the impugned judgment and order of conviction convicting A-2 and sentencing him to suffer R.I. for 10 years and fine of Rs.1,00,000/-, i.d., R.I. for a further period of one year is bad in law and, therefore, A-2 deserves to be acquitted by allowing the appeal filed by him. She, therefore, urged to allow Criminal Appeal No. 362 of 2002.

6. Mr. RC Kodekar, learned APP for the respondent – State of Gujarat in both the appeals, submitted that by voluminous evidence produced by the prosecution the complicity of both A-1 and A-2 are proved beyond reasonable doubt. Both of them were found at platform No.4-5 of Baroda Railway Station with two bags which they jointly carried with them. Two railway reservation tickets from Jammu to Vadodara have been found from the pocket of A-1. Therefore, both of them were carrying

the contraband article with them and they have been apprehended along with the said contraband article and in the presence of panchas recovery of contraband article was made and after completing the due formalities and safeguards envisaged under the NDPS Act, sample was sent to FSL for chemical analysis and on chemical analysis FSL found that the contraband article was charas and report in that regard was made and on that basis both of them were charge-sheeted. At the end of the trial, as complicity of them has been proved by cogent and sufficient evidence, they were held guilty and according to Mr. Kodekar, learned APP, they have been rightly convicted and sentenced and, therefore, the impugned judgment and order of conviction and sentence does not warrant any interference in these appeals. He, therefore, urged to dismiss both the appeals.

7. This court has considered the submissions advanced by the learned advocates appearing for the parties and perused the impugned judgment and order. This Court has undertaken a complete and comprehensive appreciation of all vital features of the case and the entire

evidence on record which is read and re-read by the learned advocates for the parties with reference to broad and reasonable probabilities of the case. In light of caution sounded by the Supreme Court while dealing with NDPS Cases, this Court has examined the entire evidence on record for itself independently of the learned trial Judge and considered the arguments advanced on behalf of the accused and infirmities pressed, scrupulously with a view to find out as to whether the learned trial Judge has rightly recorded the order of conviction and sentence and also the judgments cited at the bar by Mr. Kureshi, learned advocate of A-1, the appellant of Criminal Appeal No.361 of 2002.

8. At the outset, be it noted that to combat illicit drug traffic and drug abuse, both at the national and international levels, the penal provisions contained under the NDPS Act are stringent and punishment thereunder is harsh, therefore, as per the settled principles of criminal jurisprudence, the Court of law must insist on the strict compliance of the safeguards provided under the statutory provisions contained thereunder. In

this connection, it would be appropriate to refer to the observations made by the Supreme Court in the case of Bharatbhai Bhagwanjibhai v. State of Gujarat, AIR 2003 SC 7. In para 1 of the said judgment, the Supreme Court has observed as under:

> "The Statement of Objects and Reasons of the NDPS Act categorically records the inadequacy of the existing legislation to combat illicit drug traffic and drug abuse, both at the national and international levels and it is by reason of such deficiencies in the existing laws, the legislature thought it prudent to consolidate the same and bring about a comprehensive legislation so as to meet the exigencies of the situation. A plain look at the provisions of the NDPS Act read with the Statement of Objects and the Preamble would depict the intent of legislature as regards the offences under the said consolidated legislation, which stands expressed in rather explicit language as one of the most heinous

> ones in nature. This Court, however, in consonance with criminal jurisprudence of the country has been insisting on strict compliance of the safeguards provided under the statute so as to be in tune therewith".

9. In view of the stringent penal provisions and harsh punishment provided thereunder and in view of the observations made by the Supreme Court in the above referred to judgment, we have to find out as to whether in instant case strict compliance of the safeguards provided under the statute have been observed by the Police Inspector during the course of search of the accused and seizure of the muddamal, contraband article charas.

10. In this connection, we shall first refer to the oral testimony of P.W.2, P.S.I. Haribhai Ganpatrav Galfade, the complainant, Ex.54, which is at page 68 of the appeal memo compilation. In his oral testimony he has, inter alia, stated that on 14.1.2000 at about 9.15 P.M., he and his staff, were performing patrolling at platform No.4-5 of Vadodara Railway Station. At that time they found both A-

1 and A-2 in suspicious condition. They were brought to the police station for further interrogation. During the course of their interrogation, they frightened. On inquiring about their name A-1 stated that his name is Abdulhamid Gulammohmad Shaikh whereas A-2 stated that his name is Shirajjuddin Kadar Shaikh. Therefore, the complainant, PSI Haribhai Ganpatrav Galfade, called two persons whose services could be used as panchas and in their presence further interrogation was made. When A-1 and A-2 were asked whether they would like to be searched in presence of a First Class Magistrate or a Gazetted Officer, they said 'no'. During further interrogation they stated that they came from Jammu and they belong to Doda District. In presence of the Panchas their luggages were searched. In one of the bags cloths were found and in another bag contraband article charas was found which was in the form of four balls. One ball was weighing 1kg. 150 grams, second ball was weighing1 Kg. 450 grams, third ball was weighing 1 Kg. and fourth ball was weighing 790 grams. The total weight of the contraband article recovered was about 4 kg. 390 grams. On recovery of the muddamal contraband article,

necessary formalities required under the NDPS Act were followed and due safeguards were adhered. Thereafter from each ball, three samples each of 20 grams were taken, sealed and other procedures provided under the NDPS Act were followed and subsequently the recovered sample was sent for chemical analysis to the FSL, Surat. It may be noted that during the search of their person, two railway reservation tickets from Jammu to Vadodara were found from the pocket of A-1.

It may be noted that this witness was subjected to lengthy cross-examination by the learned advocates of the accused. However, he withstood the test of cross-examination. He denied the suggestion that he has not sent the sample to FSL in sealed cover.

11. To corroborate the evidence of P.W.2, PSI Haribhai Ganpatrav Galfade, the complainant, the prosecution has examined P.W.8, Ashabhai Chhaganbhai Barot, Police Witness, Ex.73 which is at page 122 of the appeal memo compilation, P.W.9, Gajendrasinh Indrasinh Sisodia, Police witness, Ex.75 which is at page 126 of the appeal

memo compilation and P.W.10, Kalidas Ambalal Valand, Police Witness, Ex.78 which is at page 130 of the appeal memo compilation. They, inter alia, testified as to how the accused have been apprehended and how the recovery of the contraband article was made from them and how the muddamal was sent to FSL. They also withstood the test of cross-examination and nothing substantial which would assist the defence of the accused or which can be said that the necessary procedures under the NDPS Act have not been followed, has been brought out. According to this court, in view of the evidence of the aforesaid witnesses, complicity of A-1 and A-2 has been established beyond reasonable doubt.

12. It is contended by the learned advocates of the appellants that two independent witnesses i.e., P.W.5, Mohd. Afzal Hajimiya, independent witness, Ex.69 which is at page 112 of the appeal memo compilation and P.W.6, Mumtazbanu Hussainmiya, independent witness, Ex.70 which is at page 112 of the appeal memo compilation, have not supported the persecution case and they have turned hostile. Therefore the prosecution has failed to

establish the case against the accused persons.

13. It is true that they have turned hostile. Notwithstanding that fact, the contents of whatever they have stated during the course of investigation before the investigating officer has been a statement under section 162 of the Code and they have been proved in the evidence of the P.W.11, Juvansinh Gulabsinh Rathod, Police Inspector and Investigating Officer, Ex.81, which is at page 133 of the appeal memo compilation. P.W.11 has in his evidence before the court stated that he has recorded the statement of the witnesses as per their version. Besides this, the statements of P.W.5 and P.W.6 are recorded in connection with two other accused persons i.e., original accused Nos.3 and 4 who have been acquitted by the learned trial Judge and not before this court. Therefore, according to this Court, the contention that two independent witnesses have not supported the persecution case, therefore, the prosecution has filed to prove the charge against the accused persons, has no substance as their evidence is not relevant for the purpose of deciding complicity of A-1 or A-2.

14. The contention of the learned advocates of A-1 and A-2 that P.W.1, Rameshlal Keshavlal Rathod, Panch witness of search and seizure panchnama, Ex.29 which is at page 48 of the appeal memo compilation and P.W.7, Shankerbhai Dhanjibhai Marvadi, Panch witness of search and seizure panchnama, Ex.71 which is at page 116 of the appeal memo compilation, have not supported the prosecution case with regard to the panchnama and they have turned hostile and, therefore, contents of the Panchnama are not proved and, therefore, the persecution case cannot be believed, is absolutely feeble and has no substance and merit.

15. It is well settled that merely because the panch witnesses do not support the case of the prosecution, the case of the prosecution need not be thrown over-board as unreliable. It may be realised that the phenomenon of panch witnesses turning hostile to the persecution is not unknown and is ever on the increase. It needs hardly to be emphasised that the decision of a case does not depend solely on the question whether the panch

witnesses support the prosecution or turn their back on it. If the decision of the case were to depend solely on the testimony of panch witnesses regardless of the evidence of police officers, in theory, it would be giving a right to veto to the panchas so far as that question of culpability of an accused is concerned, which is not permissible in criminal jurisprudence. It is well settled that without good ground being pointed out, testimony of police officer, if otherwise found to be true and dependable, cannot be discarded by Court on the ground that he is a police officer. On the facts and in the circumstances of the case, this Court finds that testimonies of P.W.2, Haribhai Ganpatrav Galfade, PSI – complainant, Ex.54, P.W.8, Ashabhai Chhaganbhai Barot, Police witness Ex.73, P.W.9, Gajendrasinh Indrasinh Sisodia, Police witness Ex.75 and P.W.10, Kalidas Ambalal Valand, Police witness Ex.78 are not only inspiring confidence, but, get corroboration from the other evidence on record and from the evidence of P.W.11, Police Inspector - Juvansinh Gulabsinh Rathod, Investigating Officer, Ex.81, contents of the Panchnama have been proved and they are given exhibit numbers as well. Therefore, according to this

Court, the said panchnama can be relied upon to decide the complicity of the accused.

16. Lastly, the contention of Mr. Kureshi, learned advocate of A-1, that the contraband article charas was found from the second bag which was being carried by A-2 and, therefore, A-1 cannot be held guilty to the offence, has also no substance and merit.

In the case of State of Punjab (supra), which is relied upon by Mr. Kureshi, learned advocate of A-1, it was the allegation against the accused that they were alleged to have been found present at the place where about 100 bags of poppy recovered, sitting on such bags, and they failed to to give any satisfactory explanation for being present at that time. In that case, the Supreme Court has held that merely by being found to be present at the place where the poppy bags were found and the failure to give any satisfactory explanation for being so present did not prove that the accused persons were in possession of the said poppy bags.

In Sorabkhan Gandhkhan Pathan's case (supra), 1960 grams of charas were recovered from the possession of A-1 who was travelling in an auto-rickshaw along with A-2 and two others. In that case A-1 and A-2 were convicted. In the said case the Supreme court has held that since prosecution case against A-1 was established, he was rightly convicted but no material was produced to establish that either A-2 had knowledge that A-1 was carrying contraband or was conniving with the said accused in carrying the contraband and conviction of A-2 in absence of any such material, only on the basis of his being in the rickshaw, was held not sustainable.

17. According to this court, both these judgments relied upon by Mr. Kureshi, learned advocate of A-1, are of no avail or assistant to A-1. Both the aforesaid cases before the Supreme Court rested on the facts of those cases. In instant case, there is clinching evidence that both A-1 and A-2 were found together at Vadodara Railway Station at platform No.4-5. A-1 and A-2 both belong to Doda District of Jammu and they came from Jammu to Vadodara. Two railway reservation tickets from Jammu to Vadodara were

found from the pocket of A-1. A-1 and A-2 were carrying one bag each. It is obvious that two bags could not be lifted by one person and, therefore, both the accused persons lifted each bag. Though in the bag being carried by A-1 only cloths were found but no contraband article was found but from the bag being carried by A-2 the contraband article charas was recovered, the contention of A-1 that he had no knowledge about the contraband article being carried by A-2 in the bag cannot be believed. At the cost of repetition, it may be noted that the contraband article charas was found from the bag being carried by A-2 which was concealed in maize atta. A-1 and A-2 belong to Doda District of Jammu & Kashmir. It is difficult to believe that A-2 came to Vadodara from Jammu without any extra cloth with him. Therefore, it is very clear that cloths of both A-1 and A-2 were kept in the bag being carried by A-1 and in the bag being carried by A-2, contraband article was concealed in maize atta. As stated above, two railway reservation tickets from Jammu to Vadodara were found from the pocket of A-1. Therefore, it is clear that A-1 and A-2 had travelled from Jammu to Vadodara together and after alighting at

Vadodara Railway Station they were found loitering at Platform No.4-5 of Vadodara Railway Station and as they were found in suspicious condition by the complainant-Haribhai Ganpatrav Galfade, they were apprehended and the contraband article charas was recovered. It is by chance that while A-1 and A-2 were at platform No.4-5 of Vadodara Railway Station, A-1 lifted the bag containing cloths and A-2 carried the bag containing contraband article charas. Therefore, according to this court, there is no room for doubt about the complicity of A-1 as well in the commission of the offence.

18. In view of the aforesaid evidence, there is no manner of doubt that when the accused were intercepted, apprehended and searched, they were found to be in possession of contraband article charas. Necessary formalities of search and seizure were made in presence of pacnhas and complied with the requirements and observed all the formalities contained under the NDPS Act, samples were sent to FSL after following the procedures under the NDPS Act.

19. On close scrutiny of the evidence on record, we find no infirmities in the findings, ultimate conclusion and the resultant order of conviction and sentence recorded by the learned trial Judge. We are in complete agreement with the said findings, ultimate conclusion and resultant order of conviction and sentence passed by the learned trial Judge, as according to us, no other conclusion is possible except the one reached by the learned trial Judge in the facts and circumstances of the case.

20. No new argument is advanced. No new criticism is offered. No infirmity in the reasoning of the learned trial Judge is pointed out. The evidence has been carefully analyzed and fully appreciated in the closely reasoned judgment with which we fully concur. We do not think it right to invest public time in reiterating the same reasoning in our language or giving the same answers to the same criticism in our own words for the sake of form.

21. In aforesaid view of the matter, there is no valid

reason or justifiable ground to interfere with the impugned judgment and order of conviction and sentence. The sentence awarded to the accused is minimum and has to be maintained.

22. On the wake up of the aforesaid, we are not inclined to interfere with the judgment and order of conviction and sentence recorded by the learned trial Judge and hence these appeals lack merit and deserve to be dismissed.

23. For the foregoing reasons, the appeals fail and accordingly they are dismissed.

(A.M. Kapadia, J.)

(K.A. Puj, J.)

(karan)